



# STATE OF IOWA

KIM REYNOLDS  
GOVERNOR

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May 30, 2019

Annuity Suitability (A) Working Group  
c/o Jolie H. Matthews  
National Association of Insurance Commissioners  
Hall of the States Building, Suite 700  
444 North Capitol Street, N.W.  
Washington, D.C. 20001-1512  
[jmatthews@naic.org](mailto:jmatthews@naic.org)

RE: Comments to the Annuity Suitability Model

Dear Ms. Matthews:

The Iowa Insurance Division submits the following written comments and attached proposed draft revisions to the *Suitability in Annuity Transactions Model Regulation* (#275).

After many months of discussion, proposals, and comments, Iowa is prepared to propose a transactional best interest standard in accord with Regulation Best Interest as proposed by the U.S. Securities and Exchange Commission (SEC). As explained in the Working Group's drafting note in the November 2018 draft, we have always acknowledged the important goal of the SEC's April 2018 proposals to move toward a harmonized best interest standard of conduct for broker-dealers and agents that substantially raises the professional obligations for recommendations, while preserving and differentiating the fiduciary standard for investment advisers. We also believe that annuity regulations for insurance producers and insurers may be harmonized with the SEC's Regulation Best Interest.

As of today, the SEC has not articulated in the actual text of its Regulation Best Interest proposal an incorporation of suitability foundations. In contrast, we firmly believe that the actual text of the NAIC model regulation for annuity transactions should draw on the processes associated with suitability to shape the higher "best interest" professional standard. While this is a different approach from the SEC, it is consistent with the SEC's intent as known from its interpretive material and advice of our counsel.<sup>1</sup> Only in expressing what we mean, can we clarify the distinctions between fiduciaries' asset management obligations and transaction-based recommendation obligations. Our experience in Iowa has proven that varied advisory models offer incredibly valuable consumer access to retirement education and security. Consumer choices should be preserved.

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<sup>1</sup> HUSCH BLACKWELL Legal Memorandum, page 12 (presented on April 6, 2019 at NAIC Spring National Meeting [https://www.naic.org/meetings1904/cmte\\_a\\_aswg\\_2019\\_spring\\_nm\\_materials.pdf](https://www.naic.org/meetings1904/cmte_a_aswg_2019_spring_nm_materials.pdf))

Once the decision has been made to raise the professional standards to “best interest,” no purpose is served by retaining a lateral standard of “suitability” in the text of the rule. The foundations of “suitability” are subsumed into the principles of “best interest” and no clarity is gained by retaining the distinction. We are persuaded that incorporating some of the significant guidance offered by the SEC into the text of our model regulation will elevate the professional responsibility in annuity recommendations to a true best interest obligation.

The attached draft articulates a best interest standard through the following four obligations: (1) care, (2) disclosure, (3) conflict of interest, and (4) documentation. Many of the obligation sections contain language the working group has previously agreed upon. Some of the redistribution of prior proposed provisions is the result of more carefully aligning the requirements with these four obligations. We have received encouragement from several interested parties that this approach would better harmonize NAIC requirements with the SEC’s Regulation Best Interest.

We do recognize that finding consensus around a description of the care obligation may prove challenging. The SEC wrote hundreds of pages of guidance related to Regulation Best Interest and many varied interpretations remain. Industry representatives in comments to date have emphasized what they collectively opine “best interest” does not mean, but these representatives have struggled to offer guidance as to what it does mean. We recognize that other regulators may be able to offer a clearer description than we were able, but today we offer the following to continue the discussion:

Care Obligation. The producer, or the insurer where no producer is involved, in making a recommendation shall exercise reasonable diligence, care, skill and prudence to know the consumer’s financial situation, insurance needs and financial objectives and to understand the available recommendation options, and exercising reasonable diligence, care, skill and prudence shall have a reasonable basis to believe that after making a reasonable inquiry into options available to the producer, or the insurer where no producer is involved, the recommended option would be best suited to the consumer over the life of the product, as evaluated in light of the consumer profile information and under the present circumstances known at the time of the recommendation.

We again propose retaining “reasonable basis” from the suitability foundations because it recognizes the broad good faith business judgment involved among many professionals providing advice. Understanding the wide range of good faith opinions found in every profession, we do propose the insurance professional’s good faith aspiration should be to recommend the product within the scope of the producer’s expertise that best fits the consumer’s financial situation, insurance needs and financial objectives. Our attorneys advised us that Regulation Best Interest was intended by the SEC to require that a “broker-dealer must maximize an investor’s financial outcome”<sup>2</sup> and that the product must be of the “greatest benefit” to the consumer.<sup>3</sup> While we appreciate this legal advice, we believe that maximizing financial outcome may also carry greater risk or uncertainty in outcome. No product or strategy that is dependent on future market performance avoids all uncertainty in outcome. Further, the financial outcomes of income stream products such as annuities are impacted by unknowable future personal

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<sup>2</sup> *Id.*, page 15.

<sup>3</sup> *Id.*, page 16.

circumstances such as length of life. Consumers' objectives may include more certainty and the emotional benefits of guarantees, so these benefits may not be measureable as purely financial. Further, some consumers may prioritize the potential for even higher financial outcome with less certainty and greater risk. For these reasons, we are proposing the professional's judgment should be pointed to "the recommended option would be best suited to the consumer over the life of the product." This interpretation does not limit the analysis to financial benefits since some options offer a desired certainty or "peace of mind." The use of the phrase "best suited" recognizes the varied benefits that some options offer to meet the consumer's financial situation, insurance needs and financial objectives.

To facilitate the working group's discussion, our proposed edits to the working group's November 2018 Draft are printed in red, and have either an underline for additions or a strikethrough for deletions. However, we offer the following additional notes:

- All references to a distinct obligation of "suitability" in the text have been removed as the principles of the care obligation include the suitability foundations. Yet, the title "Suitability in Annuity Transactions Model Regulation" remains because of the specific reference to the title of this model in the Dodd-Frank Act. Under the attached proposed changes, suitability principles have been elevated to best interest.
- Section 6(A) is from the prior draft's 6(A)(1), is retitled "Best Interest Obligations" and contains the four obligations previously mentioned.
- The Care Obligation (6(A)(1)) expressly builds the higher duties of care to the "know your customer" and to "know the product" requirements of suitability, and also elevates the obligation to a best interest standard. We propose using the express language of the care requirements beginning with "reasonable diligence, care, skill and prudence" as previously agreed in 6(A)(2);
  - (a) is based upon 6(B)(1) of the prior draft;
  - (b) is based upon 6(B)(2) of the prior draft;
  - (c) is new;
  - (d) is new;
  - (e) is based upon 6(D)(3) of the prior draft;
  - (f) is based upon 6(D)(1)(b) of the prior draft;
  - (g) is based upon 6(D)(1)(c) of the prior draft;
  - (h) is based upon 6(D)(2) of the prior draft;
  - (i) is new;
  - (j) is based upon 6(G)(2) of the prior draft; and
  - (k) is based upon 6(D)(1)(d) of the prior draft.
- The Disclosure Obligation in 6(A)(2) contains 6(C)(1)-(2) and (D)(1)(a) of the prior draft.
- The Conflict of Interest Obligation in 6(A)(3) contains 6(C)(3)-(5) and 6(A)(1) of the prior draft.
- The Documentation Obligation in 6(A)(4) contains 6(G) of the prior draft.

We know much work has been done to increase consumer protections by enhancing producers' professional responsibilities. However, we believe that best interest obligations that place the consumer interests first will be achieved if properly and fairly described.

Respectfully,

A handwritten signature in blue ink, appearing to read "Douglas M. Ommen". The signature is fluid and cursive, with a large initial "D" and "O".

Douglas M. Ommen  
Iowa Insurance Commissioner

CC: Director Jillian Froment, Chair



## Iowa's Proposed Edits to 11/19/18 Draft (5/30/19)

Draft: 11/19/18  
Model #275

Comments are being requested on this draft. The revisions to this draft reflect changes made from the existing model. Comments should be sent only by email to Jolie Matthews at [jmatthews@naic.org](mailto:jmatthews@naic.org) by Friday, February 15, 2019.

### SUITABILITY IN ANNUITY TRANSACTIONS MODEL REGULATION

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#### Section 1. Purpose

- A. The purpose of this regulation is to require insurers to establish a system to supervise recommendations and to set forth standards and procedures for recommendations to consumers that are suitable, in the consumer's best interest and result in transactions involving annuity products so that the insurance needs and financial objectives of consumers at the time of the transaction are appropriately addressed.
- B. Nothing herein shall be construed to create or imply a private cause of action for a violation of this regulation.

~~**Drafting Note:** The NAIC acknowledges that the goal of the U.S. Securities and Exchange Commission's (SEC) April 2018 proposals is to move toward a harmonized best interest standard of conduct for broker-dealers and agents that substantially raises the professional obligations for recommendations, while preserving and differentiating the fiduciary standard for investment advisers. As of the November 2018 Draft of the amended *Suitability in Annuity Transactions Model Regulation* (#275), the SEC's proposed use of the term "best interest" in the actual text of the SEC's Regulation Best Interest proposal appears to describe "best interest" as including "best interest" without further definition and is not distinguished from the investment adviser fiduciary. The SEC has received many public comments on use of the phrase "best interest" and may provide greater clarity in its final rule. While the NAIC fully supports a similar goal of a harmonized standard of conduct, and has a strong preference to remain consistent with FINRA rules in connection with a recommendation of variable annuities, the NAIC is not yet convinced that this November 2018 Draft of the amended *Suitability in Annuity Transactions Model Regulation* (#275) is legally distinct from the enhanced standards that are intended by the SEC. Until such time the NAIC can evaluate any distinction in the text of the SEC proposal between a "best interest" recommendation and investment adviser fiduciary duties, and the SEC and FINRA have finalized relevant terms, definitions and related requirements, the NAIC would opt to refrain from using the phrase "best interest" in Section 6A(1) of the proposed modifications to the *Suitability in Annuity Transactions Model Regulation* (#275).~~

**Drafting Note:** The language of subsection B comes from the NAIC Unfair Trade Practices Act. If a State has adopted different language, it should be substituted for subsection B.

**Drafting Note:** Section 989J of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act") specifically refers to this model regulation as the "Suitability in Annuity Transactions Model Regulation." Section 989J of the Dodd-Frank Act confirmed this exemption of certain annuities from the Securities Act of 1933 and confirmed state regulatory authority. This regulation is a successor regulation that exceeds the requirements of the 2010 model regulation.

## Section 2. Scope

This regulation shall apply to any sale or recommendation of ~~to purchase, exchange, or replace~~ an annuity ~~made to a consumer by an insurance producer, or an insurer where no producer is involved, that results in the purchase, exchange or replacement recommended.~~

## Section 3. Authority

This regulation is issued under the authority of [insert reference to enabling legislation].

**Drafting Note:** States may wish to use the Unfair Trade Practices Act as enabling legislation or may pass a law with specific authority to adopt this regulation.

## Section 4. Exemptions

Unless otherwise specifically included, this regulation shall not apply to transactions involving:

- A. Direct response solicitations where there is no recommendation based on information collected from the consumer pursuant to this regulation;
- B. ~~Contracts Annuities that are not individually solicited and are~~ used to fund:
  - (1) An employee pension or welfare benefit plan that is covered by the Employee Retirement and Income Security Act (ERISA);
  - (2) A plan described by sections 401(a), 401(k), 403(b), 408(k) or 408(p) of the Internal Revenue Code (IRC), as amended, if established or maintained by an employer;
  - (3) A government or church plan defined in section 414 of the IRC, a government or church welfare benefit plan, or a deferred compensation plan of a state or local government or tax-exempt organization under section 457 of the IRC; or
  - (4) A nonqualified deferred compensation arrangement established or maintained by an employer or plan sponsor;
- C. Settlements of or assumptions of liabilities associated with personal injury litigation or any dispute or claim resolution process; or
- D. Formal prepaid funeral contracts.

## Section 5. Definitions

- A. "Annuity" means an annuity that is an insurance product under State law that is individually solicited, whether the product is classified as an individual or group annuity.
- B. "Cash compensation" means any discount, concession, fee, service fee, commission, sales charge, loan, override, or cash benefit received by a producer in connection with the recommendation or sale of an annuity from an insurer, intermediary, or directly from the consumer.
- ~~C. "Consumer" means the owner or prospective owner of an annuity contract.~~
- C. "Consumer profile information" means information that is reasonably appropriate to determine whether a recommendation is in furtherance of the consumer's interests, including the following:
  - (1) Age;
  - (2) Annual income;



- (3) Financial situation and needs, including debts and other obligations;
- (4) Financial experience;
- (5) Financial objectives;
- (6) Intended use of the annuity;
- (7) Financial time horizon;
- (8) Existing assets or financial products, including investment, annuity and insurance holdings;
- (9) Liquidity needs;
- (10) Liquid net worth;
- (11) Risk tolerance, including willingness to accept non-guaranteed elements in the annuity, including variability in premium, death benefit or fees;
- (12) Financial resources used to fund the annuity; and
- (13) Tax status.

- D. "Continuing education credit" or "CE credit" means one continuing education credit as defined in [insert reference in State law or regulations governing producer continuing education course approval].
- E. "Continuing education provider" or "CE provider" means an individual or entity that is approved to offer continuing education courses pursuant to [insert reference in State law or regulations governing producer continuing education course approval].
- F. "FINRA" means the Financial Industry Regulatory Authority or a succeeding agency.
- G. "Insurer" means a company required to be licensed under the laws of this state to provide insurance products, including annuities.
- H. "Insurance producer" or "producer" means a person or entity required to be licensed under the laws of this state to sell, solicit or negotiate insurance, including annuities.
- I. "Suitability information" means information that is reasonably appropriate to determine the suitability of a recommendation, including the following:
  - (1) Age;
  - (2) Annual income;
  - (3) Financial situation and needs, including the financial resources used for the funding of the annuity;
  - (4) Financial experience;
  - (5) Financial objectives;
  - (6) Intended use of the annuity;
  - (7) Financial time horizon;
  - (8) Existing assets, including investment and life insurance holdings;

## Iowa's Proposed Edits to 11/19/18 Draft (5/30/19)

- (9)——Liquidity needs;
- (10)——Liquid net worth;
- (11)——Risk tolerance; and
- (12)——Tax status.

- I. “Intermediary” means an entity contracted directly with an insurer or with another entity contracted with an insurer to facilitate the sale of the insurer’s annuities by producers.
- J. “Material conflict of interest” means a financial interest of the producer, or the insurer where no producer is involved, in the sale of an annuity that a reasonable person would expect to influence the impartiality of a recommendation.
- K. “Non-cash compensation” means any form of compensation that is not cash compensation, including, but not limited to, merchandise, gifts, tickets to paid events, prizes, travel expenses or meals and lodging.
- L. “Recommendation” means advice provided by a ~~an~~ insurance producer, or an insurer where no producer is involved, to an individual consumer that results in a purchase, an exchange or a replacement of an annuity in accordance with that advice. Recommendation does not include general communication to the public, generalized customer services assistance or administrative support, general educational information and tools, prospectuses, or other product and sales material.
- M. “Replacement” means a transaction in which a new policy or contract is to be purchased, and it is known or should be known to the proposing producer, or to the proposing insurer ~~if there is no~~ whether or not a producer is involved, that by reason of the transaction, an existing policy or contract has been or is to be any of the following:
  - (1) Lapsed, forfeited, surrendered or partially surrendered, assigned to the replacing insurer or otherwise terminated;
  - (2) Converted to reduced paid-up insurance, continued as extended term insurance, or otherwise reduced in value by the use of nonforfeiture benefits or other policy values;
  - (3) Amended so as to effect either a reduction in benefits or in the term for which coverage would otherwise remain in force or for which benefits would be paid;
  - (4) Reissued with any reduction in cash value; or
  - (5) Used in a financed purchase.

**Drafting Note:** The definition of “replacement” above is derived from the NAIC Life Insurance and Annuities Replacement Model Regulation. If a State has a different definition for “replacement,” the State should either insert the text of that definition in place of the definition above or modify the definition above to provide a cross-reference to the definition of “replacement” that is in State law or regulation.

- N. “SEC” means the United States Securities and Exchange Commission.

~~“Suitable” means a recommendation of an annuity that is consistent with the consumer’s insurance needs and financial objectives based upon the facts disclosed by the consumer or known at the time of the recommendation by the producer, or insurer where no producer is involved.~~

### Section 6. Duties of Insurers and ~~of Insurance~~ Producers

- A. In recommending to a consumer the purchase of an annuity or the exchange of an annuity that results in another insurance transaction or series of insurance transactions, the insurance producer, or the insurer where no



producer is involved, shall have reasonable grounds for believing that the recommendation is suitable for the consumer on the basis of the facts disclosed by the consumer as to his or her investments and other insurance products and as to his or her financial situation and needs, including the consumer's suitability information, and that there is a reasonable basis to believe all of the following:

- A. ~~(1)~~ **Best Interest Obligations.** A producer, or ~~an~~the insurer where no producer is involved, when making a recommendation of an annuity, shall act in the **best** interests of the consumer at the time the recommendation is made, without placing the producer's or the insurer's financial interest ahead of the consumer's interests. ~~(2)~~ A producer, or ~~the~~ insurer ~~where no producer is involved, is deemed to comply~~ complies with this subsection ~~(1)~~ by satisfying the following obligations regarding care, disclosure, conflict of interest and documentation:

~~(b)~~ Making suitable recommendations in accordance with subsection B; and

~~(c)~~ Making disclosures and acting in accordance with subsections C, D, E, F and H.

~~(3)~~ Have reasonable grounds for believing the recommendation is suitable for the particular consumer;

- (1) **Care Obligation.** The producer, or the insurer where no producer is involved, in making a recommendation (a) Acting with shall exercise reasonable diligence, care, skill and prudence to know the consumer's financial situation, insurance needs and financial objectives and to understand the available recommendation options, and exercising reasonable diligence, care, skill and prudence shall have a reasonable basis to believe that after making a reasonable inquiry into options available to the producer, or the insurer where no producer is involved, the recommended option would be best suited to the consumer over the life of the product, as evaluated in light of the consumer profile information and under the present circumstances known at the time of the recommendation.

(a) The requirement under paragraph (1) of this subsection includes Prior to the recommendation of an annuity, a producer, or an insurer where no producer is involved, shall (1) making e-reasonable efforts to obtain consumer profile information from the consumer prior to the recommendation of an annuity.

(b) The requirement under paragraph (1) of this subsection does mean a producer, or the insurer where no producer is involved, (2) shall consider the types of products the producer, or insurer where no producer is involved, is authorized and licensed to recommend or sell that may align with the consumer's disclosed consumer profile information and address the consumer's financial situation, insurance needs and financial objectives and needs, but does not require analysis or consideration of any products outside the authority and license of the producer, or the insurer where no producer is involved, or any other possible alternative products or strategies available in the market at that time.

(c) The requirement under this subsection A does not create a fiduciary obligation. It is a regulatory obligation established by the text of this rule.

(d) The requirement for a reasonable basis under paragraph (1) of this subsection does not necessarily mean a majority of all insurance and investment professionals could agree that the recommended option was the single best option, but only that it was reasonable for an ordinary producer, or the insurer where no producer is involved, in similar circumstances and with similar authority and license, to believe that recommended annuity would be best suited to the consumer over the life of the product.

(e) The consumer profile information and product costs, rates, benefits and features are those factors generally relevant in making a recommendation determination whether an annuity addresses the consumer's insurance needs and financial objectives, but the level of importance of each factor under the care obligation may vary depending on the facts and circumstances of a particular case. However, each factor shall not be considered in isolation.



(f) The requirement under paragraph (1) of this subsection includes having a reasonable basis to believe the consumer would benefit from certain features of the annuity, such as tax-deferred growth, annuitization or death or living benefit.

(g) The requirement under paragraph (1) of this subsection includes having a reasonable basis to believe the particular annuity as a whole, the underlying subaccounts to which funds are allocated at the time of purchase or exchange of the annuity, and riders and similar product enhancements, if any, ~~are suitable~~ would address the consumer's insurance needs and financial objectives known at the time of the recommendation and in light of the disclosed consumer profile information (and in the case of an exchange or replacement, the transaction as a whole ~~is suitable for~~ would address the particular consumer's insurance needs and financial objectives) based on his or her suitability information.

(h) The requirement under this section paragraph (1) of this subsection does not mean the annuity with the lowest one-time or multiple occurrence compensation structure shall necessarily be recommended, but ~~the recommendation the producer, or the insurer where no producer is involved, acting with ordinary prudence,~~ shall be diligently focused on whether the product costs, rates, benefits, features and other contractual provisions of the annuity are consistent with the actual financial situation, insurance needs and financial objectives and needs of the particular consumer.

(i) The requirement under paragraph (1) of this subsection does not mean that the producer, or the insurer where no producer is involved, has ongoing monitoring obligations under this care obligation, although that obligation may be separately owed under the terms of a fiduciary, consulting, investment advising or financial planning agreement between the consumer and the producer.

(j) The requirement under paragraph (1) of this subsection includes an oral or written description of ~~Orally, or in writing, describe to the consumer~~ the basis or bases of the recommendation to the consumer;

(k) In the case of an exchange or replacement of an annuity, the required consideration of the whole transaction by the producer, or the insurer where no producer is involved, includes the exchange or replacement is suitable including taking into consideration whether

- (i) The consumer will incur a surrender charge, be subject to the commencement of a new surrender period, lose existing benefits (such as death, living or other contractual benefits), or be subject to increased fees, investment advisory fees or charges for riders and similar product enhancements;
- (ii) ~~The consumer would benefit from product enhancements and improvements replacing product~~ will provide a would substantially benefit ~~to~~ the consumer in comparison to the replaced product over the life of the product; and
- (iii) The consumer has had another annuity exchange or replacement and, in particular, an exchange or replacement within the preceding 3660 months.

(2) ~~C-~~Disclosure Obligation. Prior to or at the time of the recommendation or sale of an annuity, the producer, or ~~the~~ insurer where no producer is involved, shall:

- (a) Prominently disclose to the consumer ~~(1)~~ a description of the scope and terms of the relationship with the consumer and the role of the producer in the transaction;
- (b) ~~(2)~~ Prominently disclose to the consumer any limitations the producer or the insurer has in regard to the following:

- (i) The type of products that the producer is authorized and licensed to recommend or sell; and
- (ii) Whether only specific insurer company products or a limited range of annuity products may be offered; and

~~D. (1) In making a recommendation the producer, or insurer where no producer is involved, shall at the time of the recommendation~~

- (c) Have a reasonable basis to believe all of the following (a) the consumer has been ~~reasonably~~ informed of various features of the annuity, such as the potential surrender period and surrender charge, potential tax penalty if the consumer sells, exchanges, surrenders or annuitizes the annuity, mortality and expense fees, investment advisory fees, potential charges for and features of riders, limitations on interest returns, potential changes in non-guaranteed elements of the annuity, insurance and investment components and market risk.

**Drafting Note:** If a State has adopted the NAIC Annuity Disclosure Model Regulation, the State should insert an additional phrase in ~~sub~~paragraph (2)(a) above to explain that the requirements of this section are intended to supplement and not replace the disclosure requirements of the NAIC Annuity Disclosure Model Regulation.

(3) Conflict of Interest Obligation.

- (a) A producer, or the insurer where no producer is involved, shall avoid or otherwise reasonably manage material conflicts of interest; and
- (b) Prior to or at the time of the recommendation or sale of an annuity, the producer, or the insurer where no producer is involved, shall disclose:

- (i) a description of the sources and types of cash compensation to be received by the producer, including whether the producer is to be compensated for the sale of a recommended annuity by commission as part of premium or other remuneration received from the insurer, intermediary or other producer or by fee as a result of a contract for advice or consulting services or fee. To satisfy the requirement of this paragraph, the producer shall disclose:

- (1) A reasonable estimate of the amount of cash compensation, which may be stated as a range of amounts or percentages; and
- (2) Whether the cash compensation is a one-time or multiple occurrence amount, and if a multiple occurrence amount, the frequency and amount of the occurrence, which may be stated as a range of amounts or percentages; and

- (ii) The type of non-cash compensation that exceeds \$500 per producer per year the producer may receive from an insurer, ~~or~~ intermediary, ~~or other producer~~ that is connected to the sale of the annuity; and

- (iii) ~~Any and all material conflicts of interest.~~

- (4) Documentation Obligation. ~~An insurance—A~~ producer, or, ~~the insurer~~ where no insurance producer is involved, ~~the responsible insurer~~——representative, shall at the time of recommendation or sale:

- (a) Make a written record of any recommendation and the grounds~~basis~~ for the recommendation



subject to ~~section 6A~~ this regulation;

- (b) Obtain a customer signed statement documenting a customer's refusal to provide the ~~suitability~~ consumer profile information, if any; and
- (c) Obtain a customer signed statement acknowledging that an annuity transaction is not recommended if a customer decides to enter into an annuity transaction that is not based on the ~~insurance~~ producer's or insurer's recommendation.

~~B. — Prior to the execution of a purchase, exchange or replacement of an annuity resulting from a recommendation, an insurance producer, or an insurer where no producer is involved, shall make reasonable efforts to obtain the consumer's suitability information.~~

**B. Transactions Not Based on Recommendation.**

- (1) Except as provided under paragraph (2) of this subsection, neither an ~~insurance~~ producer, nor an insurer, shall have any obligation to a consumer under ~~subparagraphs (1) or (2)~~ of subsection A related to any annuity transaction if:
  - (a) No recommendation is made;
  - (b) A recommendation was made and was later found to have been prepared based on materially inaccurate information provided by the consumer;
  - (c) A consumer refuses to provide relevant ~~suitability~~ consumer profile information and the annuity transaction is not recommended; or
  - (d) A consumer decides to enter into an annuity transaction that is not based on a recommendation of the insurer or the ~~insurance~~ producer.
- (2) An insurer's issuance of an annuity subject to paragraph (1) shall be reasonable under all the circumstances actually known to the insurer at the time the annuity is issued.

**C. Supervision System.**

~~(1)~~ Except as permitted under subsection ~~D~~**B**, an insurer shall not issue an annuity recommended to a consumer unless there is a reasonable basis to believe the annuity is suitable based on would appropriately address the particular consumer's insurance needs and financial objectives based on the consumer's ~~suitability~~ consumer profile information.

- ~~H. —~~ **(12)** An insurer shall establish a supervision system that is reasonably designed to achieve the insurer's and its ~~insurance~~ producers' compliance with this regulation, including, but not limited to, the following:
- (a) The insurer shall maintain reasonable procedures to inform its ~~insurance~~ producers of the requirements of this regulation and shall incorporate the requirements of this regulation into relevant ~~insurance~~ producer training manuals;
  - (b) The insurer shall establish standards for ~~insurance~~ producer product training and shall maintain reasonable procedures to require its ~~insurance~~ producers to comply with the requirements of section 7 of this regulation;
  - (c) The insurer shall provide product-specific training and training materials which explain all material features of its annuity products to its ~~insurance~~ producers;

- (d) The insurer shall maintain procedures for review of each recommendation prior to issuance of an annuity that are designed to ensure that there is a reasonable basis to determine that ~~a recommendation is suitable~~ the recommended annuity would appropriately address the particular consumer's needs and financial objectives. Such review procedures may apply a screening system for the purpose of identifying selected transactions for additional review and may be accomplished electronically or through other means including, but not limited to, physical review. Such an electronic or other system may be designed to require additional review only of those transactions identified for additional review by the selection criteria;
  - (e) The insurer shall maintain reasonable procedures to detect recommendations that are not suitable in compliance with subsections A, B, D and E. This may include, but is not limited to, confirmation of the consumer's suitability-consumer profile information, systematic customer surveys, interviews, confirmation letters and programs of internal monitoring. Nothing in this subparagraph prevents an insurer from complying with this subparagraph by applying sampling procedures, or by confirming suitability-the consumer profile information after issuance or delivery of the annuity; and
  - (f) The insurer shall maintain reasonable procedures to assess, prior to or upon issuance or delivery of an annuity, whether a producer has provided to the consumer the information required to be provided under this section subsection A; and
  - (g) The insurer shall annually provide a report to senior management, including to the senior manager responsible for audit functions, which details a review, with appropriate testing, reasonably designed to determine the effectiveness of the supervision system, the exceptions found, and corrective action taken or recommended, if any.
- (3) (a) Nothing in this subsection restricts an insurer from contracting for performance of a function (including maintenance of procedures) required under ~~paragraph (1)~~this subsection C. An insurer is responsible for taking appropriate corrective action and may be subject to sanctions and penalties pursuant to section 8 of this regulation regardless of whether the insurer contracts for performance of a function and regardless of the insurer's compliance with subparagraph (b) of this paragraph.
- (b) An insurer's supervision system under ~~paragraph (1)~~this subsection C shall include supervision of contractual performance under this subsection. This includes, but is not limited to, the following:
- (i) Monitoring and, as appropriate, conducting audits to assure that the contracted function is properly performed; and
  - (ii) Annually obtaining a certification from a senior manager who has responsibility for the contracted function that the manager has a reasonable basis to represent, and does represent, that the function is properly performed.
- (4) An insurer is not required to include in its system of supervision ~~an insurance~~ a producer's recommendations to consumers of products other than the annuities offered by the insurer.

D. Unfair trade practices. Neither a producer nor an insurer shall ~~An insurance producer shall not~~ dissuade, or attempt to dissuade, a consumer from:

- (1) Truthfully responding to an insurer's request for confirmation of the suitability-consumer profile information;
- (2) Filing a complaint; or
- (3) Cooperating with the investigation of a complaint.



E. Safe Harbor.

- (1) Sales made in compliance with SEC regulations and applicable FINRA requirements—rules pertaining to ~~suitability~~ best interest obligations and supervision of annuity transactions shall satisfy the requirements under this regulation. This subsection applies to FINRA broker-dealer sales of annuities if in connection with the sale of an annuity, the broker-dealer and the producer, who also is appropriately registered as a representative with FINRA, have complied with the business rules, controls and procedures at least as effective as those required under this regulation. However, nothing in this subsection shall limit the insurance commissioner's ability to investigate and enforce (including investigate)-the provisions of this regulation.

**Drafting Note:** Non-compliance with SEC and FINRA requirements means that the broker-dealer transaction is subject to compliance with the ~~suitability~~ requirements of this regulation.

- (2) For paragraph (1) to apply, an insurer shall:
- (a) Monitor the FINRA member broker-dealer using information collected in the normal course of an insurer's business; and
  - (b) Provide to the FINRA member broker-dealer information and reports that are reasonably appropriate to assist the FINRA member broker-dealer to maintain its supervision system.

**NOTE TO WORKING GROUP: THE WORKING GROUP DISCUSSED THE ITALICIZED LANGUAGE BELOW SUGGESTED BY NEW YORK DURING ITS OCTOBER INTERIM MEETING, BUT DEFERRED ADDING THE LANGUAGE AS AN OFFICIAL PROVISION IN THE DRAFT REVISIONS UNTIL IT COULD DISCUSS FURTHER.**

- F. Any requirement applicable to a producer under this ~~section 6Part~~ shall apply to every producer who has materially participated in the making of a recommendation and received compensation as a result of the sales transaction, regardless of whether the producer has had any direct contact with the consumer, provided that product wholesaling or product support based on generic client information, or the provision of education or marketing material, does not constitute participating in the making of a recommendation.

**Section 7. Insurance Producer Training**

- A. ~~An insurance-A~~ producer shall not solicit the sale of an annuity product unless the ~~insurance-producer~~ has adequate knowledge of the product to recommend the annuity and the ~~insurance-producer~~ is in compliance with the insurer's standards for product training. ~~An insurance-A~~ producer may rely on insurer-provided product-specific training standards and materials to comply with this subsection.
- B. (1) (a) ~~An insurance-A~~ producer who engages in the sale of annuity products shall complete a one-time four (4) credit training course approved by the department of insurance and provided by the department of insurance-approved education provider.
- (b) ~~Insurance-Producers~~ who hold a life insurance line of authority on the effective date of this regulation and who desire to sell annuities shall complete the requirements of this subsection within six (6) months after the effective date of this regulation. Individuals who obtain a life insurance line of authority on or after the effective date of this regulation may not engage in the sale of annuities until the annuity training course required under this subsection has been completed.
- (2) The minimum length of the training required under this subsection shall be sufficient to qualify for at least four (4) CE credits, but may be longer.
- (3) The training required under this subsection shall include information on the following topics:



- (a) The types of annuities and various classifications of annuities;
  - (b) Identification of the parties to an annuity;
  - (c) How product specific annuity contract features affect consumers;
  - (d) The application of income taxation of qualified and non-qualified annuities;
  - (e) The primary uses of annuities; and
  - (f) Appropriate standard of conduct, sales practices, replacement and disclosure requirements.
- (4) Providers of courses intended to comply with this subsection shall cover all topics listed in the prescribed outline and shall not present any marketing information or provide training on sales techniques or provide specific information about a particular insurer's products. Additional topics may be offered in conjunction with and in addition to the required outline.
- (5) A provider of an annuity training course intended to comply with this subsection shall register as a CE provider in this State and comply with the rules and guidelines applicable to ~~insurance~~ producer continuing education courses as set forth in [insert reference to State law or regulations governing producer continuing education course approval].
- (6) Annuity training courses may be conducted and completed by classroom or self-study methods in accordance with [insert reference to State law or regulations governing producer continuing education course approval].
- (7) Providers of annuity training shall comply with the reporting requirements and shall issue certificates of completion in accordance with [insert reference to State law or regulations governing to producer continuing education course approval].
- (8) The satisfaction of the training requirements of another State that are substantially similar to the provisions of this subsection shall be deemed to satisfy the training requirements of this subsection in this State.
- (9) The satisfaction of the components of the training requirements of any course or courses with components substantially similar to the provisions of this subsection shall be deemed to satisfy the training requirements of this subsection in this state.
- (10) An insurer shall verify that ~~an insurance~~ a producer has completed the annuity training course required under this subsection before allowing the producer to sell an annuity product for that insurer. An insurer may satisfy its responsibility under this subsection by obtaining certificates of completion of the training course or obtaining reports provided by commissioner-sponsored database systems or vendors or from a reasonably reliable commercial database vendor that has a reporting arrangement with approved insurance education providers.

## Section 8. Compliance Mitigation; Penalties

- A. An insurer is responsible for compliance with this regulation. If a violation occurs, either because of the action or inaction of the insurer or its ~~insurance~~ producer, the commissioner may order:
- (1) An insurer to take reasonably appropriate corrective action for any consumer harmed by a failure to comply with this regulation by the insurer, an entity contracted to perform the insurer's supervisory duties or by its insurance producer's, violation of this regulation the producer;

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- (2) A general agency, independent agency or the ~~insurance~~-producer to take reasonably appropriate corrective action for any consumer harmed by the ~~insurance~~-producer's violation of this regulation; and
  - (3) Appropriate penalties and sanctions.
- B. Any applicable penalty under [insert statutory citation] for a violation of this regulation may be reduced or eliminated [, according to a schedule adopted by the commissioner,] if corrective action for the consumer was taken promptly after a violation was discovered or the violation was not part of a pattern or practice.

**Drafting Note:** Subsection B above is intended to be consistent with the commissioner's discretionary authority to determine the appropriate penalty for a violation of this regulation. The language of subsection B is not intended to require that a commissioner impose a penalty on an insurer for a single violation of this regulation if the commissioner has determined that such a penalty is not appropriate.

**Drafting Note:** A State that has authority to adopt a schedule of penalties may wish to include the words in brackets. In that case, "shall" should be substituted for "may" in the same sentence. States should consider inserting a reference to the NAIC Unfair Trade Practices Act or the State's statute that authorizes the commissioner to impose penalties and fines.

### Section 9. ~~{Optional}~~ Recordkeeping

- A. Insurers, general agents, independent agencies and ~~insurance~~-producers shall maintain or be able to make available to the commissioner records of the information collected from the consumer, disclosures made to the consumer and other information used in making the recommendations that were the basis for insurance transactions for [insert number] years after the insurance transaction is completed by the insurer. An insurer is permitted, but shall not be required, to maintain documentation on behalf of an ~~insurance~~-a producer.

**Drafting Note:** States should review their current record retention laws and specify a time period that is consistent with those laws. For some States this time period may be five (5) years.

- B. Records required to be maintained by this regulation may be maintained in paper, photographic, micro-process, magnetic, mechanical or electronic media or by any process that accurately reproduces the actual document.

**Drafting Note:** This section may be unnecessary in States that have a comprehensive recordkeeping law or regulation.

### Section 10. Effective Date

The amendments to this regulation shall take effect [~~six(6)~~X] months after the date the regulation is adopted or on [insert date], whichever is later.

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